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ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

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May 14, 2014

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler:

We spoke last month about the importance of network neutrality and my support for strong, enforceable rules of the road to protect the free and open Internet. I appreciate your commitment to reinstate open Internet rules based on a solid legal framework that preserves innovation, competition, and consumer choice online. And I support your decision to ask the Commissioners of the Federal Communications Commission to vote on these proposed rules on May 15, 2014.

Since our discussion, I understand you have further modified your proposal to ensure the Commission's new rules will not legalize segregation of the Internet into fast and slow lanes under a "paid prioritization" arrangement between broadband providers and content companies. These schemes have always been antithetical to the principles of an open Internet, and I commend you for taking this step.

I also support your efforts to reinstate the no-blocking and nondiscrimination rules.

This proceeding will be the FCC's third attempt to establish open Internet rules. The difficulty in establishing these rules has not been their substance. In 2010, I led legislative negotiations that produced the Open Internet Act of 2010, which would have prohibited blocking of websites and unjust or unreasonable discrimination by wireline broadband Internet service providers. This legislation was endorsed by all sides of the open Internet debate, including open Internet advocates like Public Knowledge and the Consumer Federation of America and the major Internet service providers including AT&T, Verizon, and cable companies represented by the National Cable and Telecommunications Association. The policies embodied in the

legislation were codified in the FCC's 2010 open Internet rules. They remain a sound foundation for the rules you are considering.

The difficulty has also not been the FCC's legal authority. There is legal consensus that the FCC has the authority to adopt these rules if the FCC reclassified broadband Internet connectivity as a telecommunications service under Title II of the Communications Act. Even the D.C. Circuit decision in *Verizon v. FCC* recognized that the open Internet rules would have been upheld if the FCC had not "chosen to classify broadband providers in a manner that exempts them from treatment as common carriers."[1]

Instead, the difficulty that the FCC has repeatedly encountered has been justifying the open Internet rules without taking the step of classifying broadband Internet service as a telecommunications service. The large service providers have fought regulation under Title II because it would carry with it the authority of the FCC to regulate rates in a future proceeding. The providers have maintained this opposition even when the FCC suggested using its authority to forbear from applying most of the requirements of Title II to broadband service, including forbearing from rate regulation.

The D.C. Circuit's decision in *Verizon* undercuts the providers' position because the court held that the FCC has authority to regulate broadband under section 706 of the Telecommunications Act without Title II reclassification. Section 706 expressly provides that the FCC can utilize "price cap regulation" and other measures to remove barriers to infrastructure investment and promote broadband deployment.[2] This means that broadband Internet service providers are subject to potential rate regulation whether they are regulated under Title II or section 706. Avoiding the remote possibility of rate regulation is no longer a persuasive rationale for avoiding the invocation of the Commission's Title II authority.

I believe the time has come for the FCC to stop putting vitally important open Internet rules in jeopardy through legal gymnastics. I have no objection to the agency's proceeding under section 706 as the preferred basis of authority, as this may generate less opposition from some quarters than proceeding under Title II. But the FCC should also use its undisputed Title II authority as additional authority. There are a number of ways the FCC could mandate automatic reinstatement of the no-blocking and nondiscrimination protections under Title II of the Communications Act in the event that the courts once again invalidate the strong open Internet rules under section 706. These could include using Title II as "backstop authority," issuing one order under section 706 and a contingent order under Title II, or reclassifying broadband Internet service as a telecommunications service and forbearing the no-blocking and nondiscrimination requirements while the section 706 rules remain in effect. This approach will allow the FCC to

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[1] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).
[2] *See* 47 U.S.C. § 1302(a).

get the policy right and avoid the need to water down essential open Internet protections out of a concern about inadequate authority.

The Internet service providers have been litigating the open Internet rules for too long. They lobby the FCC to avoid using its strongest legal authority for the open Internet rules. Then when the FCC agrees with them, they sue the agency on the basis that the FCC lacks the power to protect an open Internet. The approach I suggest would stop these legal games.

I was pleased to read that Professor Tim Wu of Columbia Law School recently made a similar proposal in the *New Yorker*. As he wrote, "the Commission's best course is to pass tough rules under 706 with Title II as the backup, to insure the rules survive a court challenge. This strategy may actually ward off court challenges. … Attempting to invalidate the rules with lawsuits could well reactivate the full authority of the Commission over broadband, with the carriers unable to blame anyone but themselves."[3]

The Internet is a great American success story thanks to our longstanding national commitment to communications policies that prevent broadband providers from acting like gatekeepers online. I urge you and your colleagues to move forward with your Notice of Proposed Rulemaking later this week and to incorporate a Title II backup proposal as part of the item.

Sincerely,

Henry A. Waxman
Ranking Member

cc: The Honorable Mignon Clyburn
Commissioner
Federal Communications Commission

The Honorable Jessica Rosenworcel
Commissioner
Federal Communications Commission

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[3] The New Yorker, *The Solution to the F.C.C.'s Net-Neutrality Problems* (May 9, 2014) (online at www.newyorker.com/online/blogs/elements/2014/05/tom-wheeler-fcc-net-neutrality-problems.html).

The Honorable Ajit Pai
Commissioner
Federal Communications Commission

The Honorable Michael O'Rielly
Commissioner
Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

June 27, 2014

The Honorable Henry Waxman
U.S. House of Representatives
Ranking Member
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Waxman,

Thank you for writing to express your concerns regarding the need to reinstate rules to preserve an open Internet for all Americans and for sharing your proposal on the use of Title II as a backstop authority to the Section 706 framework. I share your sense of urgency on this matter. For this reason, I moved with dispatch to initiate a proceeding to consider new open Internet rules to replace those that were vacated by the D.C. Circuit Court of Appeals in the *Verizon* case. As you know, the *Notice of Proposed Rulemaking* ("*Notice*") adopted by the Commission in May 2014 begins that process. Therein, we ask a number of questions about the rules we need to adopt, as well as the appropriate legal foundation for such rules. Your letter touches on some of the most important issues presented in the *Notice*, and I will ensure that it is included in the record of the proceeding and considered as part of the Commission's review. The *Notice* also seeks comment on your proposal.

The Commission has struggled for over a decade with how best to protect and promote an open Internet. While there has been bipartisan consensus, starting under the Bush Administration with Chairman Powell, on the importance of an open Internet to economic growth, investment, and innovation, we find ourselves today faced with the worst case scenario: we have no Open Internet rules in place to stop broadband providers from limiting Internet openness. The *status quo* is unacceptable. The Commission has already found, and the court has agreed, that broadband providers have economic incentives and technological tools to engage in behavior that can limit Internet openness and harm consumers and competition. As such, the Commission must craft meaningful rules to protect the open Internet, and it must do so promptly. I can assure you that I will utilize the best tools available to me to ensure the Commission adopts effective and resilient open Internet rules. Unless and until the Commission adopts new rules, broadband providers will be free to block, degrade, or otherwise disadvantage innovative services on the Internet without threat of sanction by the FCC.

With respect to the legal foundation of the rules, I believe that the Section 706 framework set forth by the court provides us with the tools we need to adopt and implement robust and enforceable Open Internet rules. Nevertheless, the Commission is also seriously considering moving forward to adopt rules using Title II of the Communications Act as the foundation for

our legal authority. The *Notice* asks specific questions about Title II, including whether the Commission should 1) revisit its classification of Broadband Internet Access as an information service; or 2) separately identify and classify as a telecommunications service a service that "broadband providers . . . furnish to edge providers," as proposed by Mozilla in a May 5 Petition filed with the agency. The *Notice* seeks comment on the benefits of both Section 706 and Title II, including the benefits of one approach over the other, to ensure the Internet remains an open platform for innovation and expression.

In addition, as suggested in your letter, the *Notice* includes and seeks comment on your proposal for the Commission to proceed under Section 706 but use Title II as a backstop authority in the event that the Section 706 rules are invalidated. This is a worthy suggestion and I was pleased to include in it the *Notice*. I look forward to the input and comment we receive on the proposal.

With respect to the substance of the rules, the proposals and questions in the *Notice* are designed to elicit a record that will give us a foundation to adopt strong, enforceable rules to protect the open Internet and prevent broadband providers from harming consumers or competition. I am especially sensitive to concerns about paid prioritization arrangements, and the potential such arrangements have for creating an Internet that is fast for a few, and slow for everyone else. Let me be crystal clear: there must only be one Internet. It must be fast, robust and open for everyone. The *Notice* addresses this issue head-on, even asking if paid prioritization should be banned outright. It also proposes clear rules of the road and aggressive enforcement to prevent unfair treatment of consumers, edge providers and innovators. Small companies and startups must be able to reach consumers with their innovative products and services, and they must be protected against harmful conduct by broadband providers.

The *Notice* includes a number of proposals designed to empower consumers and small businesses who may find themselves subject to harmful behavior by a broadband provider. For example, the Court of Appeals did uphold our existing transparency rule, and the *Notice* proposes to strengthen that rule to require that networks disclose *any* practices that could change a consumer's or a content provider's relationship with the network. The *Notice* proposes the creation of an ombudsperson to serve as a watchdog and advocate for start-ups, small businesses and consumers. And the *Notice* seeks comment on how to ensure that all parties, and especially small businesses and start-ups, have effective access to the Commission's dispute resolution and enforcement processes.

This *Notice* is the first step in the process, and I look forward to comments from all interested stakeholders, including members of the general public, as we develop a fulsome record on the many questions raised in the *NPRM*. To that end, in an effort to maximize public participation in this proceeding, we have established an Open Internet email address – openinternet@fcc.gov – to ensure that Americans who may not otherwise have the opportunity to participate in an FCC proceeding can make their voices heard. In addition, to ensure sufficient opportunity for broad public comment, we have provided a lengthy comment and reply period through September 10, 2014, that will allow everyone an opportunity to participate.

Again, I appreciate your deep interest in this matter and look forward to continued engagement with you as the proceeding moves forward.

Sincerely,

Tom Wheeler